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HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 490

LEE KWOCK DUN, BY HIS NEXT FRIEND, LEE YOU POY,
Petitioner,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting The Writ	4
Conclusion	8

CITATIONS

Cases:

Alabama Title and Trust Co. v. *Millsap,* 71 F. 2d, 518 (C. A. 5, 1934)	5
Bridges v. *Wixon,* 326 U. S. 135 at 155-156 (1945)	7
Brown v. *Peterson,* 25 App. D. C. 359, 363 (1905)	6
Chesapeake and Ohio Railway Co. v. *Martin,* 283 U.S. 209 (1931)	4
DeGregorio v. *United States,* 7 F. 2d, 295, 296 (C.A. 2, 1925)	7
Dyer v. *MacDougall,* 201 F. 2d, 265, 269 (C. A. 2, 1952)	6
Foran et al. v. *Commissioner of Internal Revenue,* 165 F. 2d, 705 (C.A. 5, 1948)	5
Gibson v. *Southern Pacific Co.,* 67 F. 2d, 758 (C. A. 5, 1933)	5
Gordon v. *United States,* 344 U. S. 414 (note 13)	7
Joseph v. *Village of Downers Grove,* 104 F. 2d, 974 (C. A. 7, 1939), certiorari denied, 308 U. S. 605	6
Loesch & Green Const. Co. v. *Commissioner of Internal Revenue,* 211 F. 2d 210 (C. A. 6, 1954)	6
Mar Gong v. *Brownell,* 209 F. 2d 448, (C. A. 9, 1954)	7
National Labor Relations Board v. *Ray Smith Transport Co.,* 193 F. 2d, 142 (C. A. 5, 1951)	5
National Labor Relations Board v. *Howell Chevrolet Co.,* 204 F. 2d, 79 (C. A. 9, 1953), affirmed on other grounds, 346 U. S. 483	6
Nicholas v. *Davis,* 204 F. 2d, 200 (C. A. 10, 1953)	4

Page

Pence v. *United States*, 316 U. S. 332, 339, 340 (1942) . 4
Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 341 (1933) 6
San Francisco Ass'n for the Blind v. *Industrial Aid*, 152 F. 2d, 532, 536 (C. A. 8, 1946) 5
Stone v. *Stone*, 136 F. 2d, 761, 764 (C.A.D.C, 1943) ... 6
Takehara v. *Dulles*, 205 F. 2d, 560, 562 (C. A. 9, 1953) . 7
Twentieth Century-Fox Film Co. v. *Dieckhaus*, 153 F. 2d, 893 (C. A. 8, 1946), certiorari denied, 329 U. S. 716 ..... 5, 7
United States v. *Johnson*, 208 F. 2d, 729 (C. A. 5, 1953) 5
United States v. *Ross*, 92 U. S. 281, 283 (1875) 7
Woodward v. *United States*, 167 F. 2d, 774 (C.A. 8, 1948) 7
Wynne v. *Boone*, 191 F. 2d, 220 (C. A. D. C., 1951) ... 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment entered herein for the respondent and dismissing petitioner's claim to American citizenship.

Opinions Below

The unreported oral opinion of the District Court is set forth at pages 105-107 of the record. The opinion in the Court of Appeals is contained at page 9, *infra* (Appendix A.)

Jurisdiction

The judgment of the Court of Appeals was entered on November 18, 1954 (p. 9, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Where it was conceded that an American citizen was the father of an American child born abroad, and the uncontradicted and unimpeached testimony of the father and his brother, both present at the child's birth, identified petitioner as that child, was the trier of fact at liberty to disregard such testimony?

2. Where improper considerations, (i. e., failure to produce cumulative testimony of a brother, lack of resemblance to his father, failure to reside with his father, and collateral inconsistencies) were given weight by the District Court in rejecting petitioner's claim to American citizenship, was it proper for the Court of Appeals to affirm the District Court's ruling?

Statutes Involved

Revised Statutes, Section 1993 (2 Stat. 153) in force from April 14, 1802, until May 24, 1934 (48 Stat. 797, 8 U. S. C. 6), provides as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Statement

This action is for a declaratory judgment to establish petitioner's citizenship, pursuant to 8 U. S. C. 903.

Petitioner, Lee Kwock Dun, was born in China on December 27, 1932. The Government admitted in the Courts below that Lee You Poy, an American citizen at birth and a World War II veteran, had a son by the name of Lee Kwock Dun, who was born in China (R. 22, 94-95). Both Lee You Poy and an uncle of petitioner, testified without contradiction or impeachment that the petitioner was the Lee Kwock Dun born to Lee You Poy, and that they were present in China at his birth. (R. 90-95; 50-59). As the son of an American citizen, petitioner would be an American citizen, although born abroad, under Revised Statute 1993 (8 U. S. C. 6). Petitioner's uncle testified further that he recognized petitioner by his facial features and a scar between his eyebrows sustained at the age of five when both were in the same household in China. (R. 53). Petitioner identified his father and was not contradicted as to any details relative to his place or date of birth, or his parents. (R. 25-36). Blood tests were compatible with the claimed relationship. (R. 95). Nevertheless, the Courts below sustained a finding that petitioner was not the son of Lee You Poy and therefore not a citizen under Revised Statutes 1993 (8 U. S. C. 6) because he failed to produce a brother one year older as a witness, because he failed to resemble his father, because he did not reside with his father in the United States and because of inconsistent statements by petitioner upon collateral matters, such as the height of his school house in China, the composition of the village gates, the direction of Toyshan City from his native village, and other collateral matters. (R. 106-107). No assertion was made by the Courts below that the credibility of petitioner's witnesses was in any wise questioned. The Circuit Court's per curiam decision, implicitly, finds that if the District Court utilized erroneous standards, then "no substantial rights" were affected. (Appendix A, p. 9).

Reasons for Granting the Writ

1. There is here presented a wide conflict of decisions by Circuit Courts of Appeal upon a vital rule of evidence in the trial of civil, criminal, and administrative law cases.

In the instant case there wasn't one iota of proof inconsistent with the testimony of petitioner's father and uncle that petitioner was the Lee Kwock Dun born abroad to the father. Inference, surmise and suspicion alone were utilized to rebut the uncontradicted evidence of birth. At least five Circuits hold that such uncontradicted evidence may not be disregarded.

In *Chesapeake and Ohio Railway Co.* v. *Martin,* 283 U. S. 209 (1931) this Court said:

> "The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony."

See also: *Pence* v. *United States,* 316 U. S. 332, 339, 340 (1942).

The Fifth, Sixth, Seventh, Eighth and Tenth Circuits, following the *Chesapeake & Ohio Railway Co.* case, adhere to the rule that uncontradicted and unimpeached credible testimony may not be disregarded.

The conclusive effect of uncontradicted testimony of even interested witnesses was recently acknowledged in *Nicholas* v. *Davis,* 204 F. 2d 200 (C. A. 10, 1953) where the Court said:

> "When controlling, positive and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstances reflected in the record cast a doubt on its verity, then under the principles laid

down in *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983, it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury."

In *Twentieth Century Fox Film Co.* v. *Dieckhaus*, 153 F. 2d 893 (C. A. 8, 1946, certiorari denied 329 U. S. 716) the Court declared:

". . . the law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witness or substantial contradiction, or, if the circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point . . ."

See also: *San Francisco Ass'n for the Blind* v. *Industrial Aid*, 152 F. 2d 532, 536 (C. A. 8, 1946). The rule of the Fifth Circuit is set forth in *United States* v. *Johnson* 208 F. 2d 729 (C. A. 5, 1953); *National Labor Relations Board* v. *Ray Smith Transport Co.*, 193 F. 2d 142 (C. A. 5, 1951); *Foran et al.* v. *Commissioner of Internal Revenue*, 165 F. 2d 705 (C. A. 5, 1948); *Gibson* v. *Southern Pacific Co.*, 67 F. 2d 758 (C. A. 5, 1933) and *Alabama Title and Trust Co.* v. *Millsap*, 71 F. 2d 518 (C. A. 5, 1934).

In *National Labor Relations Board* v. *Ray Smith Transport Co., supra*, the Court declared:

". . . Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence . . ."

The rule in the Sixth Circuit, is set forth in *Loesch & Green Const. Co.* v. *Commissioner of Internal Revenue,* 211 F. 2d 210 (C. A. 6, 1954) and that of the Seventh is announced in *Joseph* v. *Village of Downers Grove,* 104 F. 2d 974 (C. A. 7, 1939, certiorari denied, 308 U. S. 605).

To the contrary, however, are the views of the Second, Ninth and District of Columbia Circuits. *Dyer* v. *MacDougall,* 201 F. 2d 265, 269 (C. A. 2, 1952); *National Labor Relations Board* v. *Howell Chevrolet Co.,* 204 F. 2d 79 (C. A. 9, 1953; affirmed on other grounds, 346 U. S. 483); *Wynne* v. *Boone,* 191 F. 2d 220 (C. A. D. C., 1951). The District of Columbia Circuit originally announced that the trier of facts could not arbitrarily disregard unimpeached and uncontradicted testimony. *Brown* v. *Peterson,* 25 App. D. C. 359, 363 (1905); *Stone* v. *Stone,* 136 F. 2d 761, 764 (C. A. D. C., 1943). A long line of cases beginning in 1905 was overruled in 1951 when *Wynne* v. *Boone, supra,* was decided. The Ninth Circuit refers to the rule requiring acceptance of uncontradicted testimony as "an ancient fallacy which somehow persists despite the court's numerous rulings to the contrary." *National Labor Relations Board* v. *Howell Chevrolet, supra,* at page 86.

Whether the rule is indeed an ancient fallacy or whether the trier of fact may not arbitrarily disregard unimpeached, uncontradicted credible evidence is an important problem in the law of evidence, frequently arising in numerous civil, criminal and administrative trials and hearings, which should be settled by this Court.

2. Apart from the foregoing, there is here involved the erroneous standards applied by the District Court which the Circuit Court approved. This Court has observed that a rebuttable inference "must necessarily yield to credible evidence of the actual occurrence." *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 341 (1933).

The courts below relied upon inference and suspicion to overcome the affirmative testimony as to petitioner's paternity and his American citizenship. Inferences adverse to petitioner were drawn as a result of: (1) *His failure to produce the cumulative testimony of a brother, one year older.* The Second Circuit holds to the contrary, that unfavorable inferences may not be drawn "when the uncalled witness is purely cumulative, and when he was not in a better position to know the facts than those who were called." *DeGregorio* v. *United States,* 7 F. 2d 295, 296 (C. A. 2, 1925). (2) *His non-resemblance to his father.* Evidence of family resemblance or non-resemblance has little, if any, probative value. *Woodward* v. *United States,* 167 F. 2d 774 (C. A. 8, 1948). (3) *His failure to reside with his father in the United States.* No inference of fact can be drawn from such circumstances. At most, it gives rise to a choice of probabilities which does not constitute evidence. *United States* v. *Ross,* 92 U. S. 281, 283 (1875). (4) *Inconsistent statements upon collateral matters.* Petitioner was cross-examined on such matters as the height of his school house in China, composition of the village gates, direction of Toyshan City from his native village, and other collateral matters. Contrary to *Gordon* v. *United States,* 344 U. S. 414 (note 13) and over objections (R. 39, 95), independent evidence was introduced to show prior inconsistent statements on these matters. In any event, the proof of such inconsistent statements should not have been given probative value. *Twentieth Century Fox Film Co.* v. *Dieckhaus, supra.*

Suspicion and surmise, resulting from adverse inferences drawn on the four grounds noted above motivated the District Court to award judgment for respondent (R. 106-107). Application of these erroneous standards would have been basis for a reversal in the Ninth Circuit. *Takehara* v. *Dulles,*